

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

GEORGE STOBA, and DAPHNE
STOBA, on behalf of themselves and
others similarly situated.,

Plaintiffs,

V.

SAVEOLOGY.COM, LLC; ELEPHANT GROUP, INC.; TIME WARNER CABLE, INC.; and DOES 1 through 20, inclusive.

Defendants.

Case No.: 13cv2925 BAS (NLS)

ORDER:

**(1) GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
EX PARTE APPLICATION FOR
ORDER REQUIRING WITNESSES
TO APPEAR AT DEPOSITIONS
(Discovery Dispute No. 5)
[Dkt. No. 169]; and**

(2) DENYING PLAINTIFFS' EX PARTE MOTION FOR AN ORDER ALLOWING PLAINTIFFS TO CONDUCT FURTHER DISCOVERY (Discovery Dispute No. 6) [Dkt. No. 175].

This is a prospective class action alleging violations of the California Invasion of Privacy Act, Cal. Pen. Code §§ 632 and 632.7(c)(1). Procedurally, Plaintiffs have filed a motion for class certification. Defendants' opposition to that motion is currently due July 8, 2016. Now, the parties filed two competing discovery motions with each asking to compel certain discovery. For the following reasons, the court **GRANTS in part and DENIES in part** Defendants' motion to compel witness depositions, and **DENIES** Plaintiffs' motion to compel further discovery.

1 **Relevant Background.**

2 Named Plaintiffs George Stoba and Daphne Stoba allege they were contacted on
 3 multiple occasions on their landline by a telemarketing company, defendant
 4 Saveology.com, LLC. Defendant Elephant Group, Inc. (EGI) is the parent company of
 5 Saveology. Saveology made the contacts on behalf of defendant Time Warner Cable,
 6 Inc. The Stobas allege that their telephone calls were recorded without their consent
 7 and without the proper notice, all in violation of California law. They make these
 8 claims on behalf of a purported class of people physically located or residing in
 9 California. They also seek to certify a subclass for cell phone users.

10 Procedurally, class discovery closed in this case—after several extensions and
 11 discovery disputes—on June 26, 2015. Meanwhile, on June 16, 2015, defense counsel
 12 had asked Plaintiffs’ counsel about disclosing the experts on which they intended to
 13 rely in the class certification motion. Feldman Decl. Ex. A, p.15. That same day,
 14 Plaintiffs’ counsel replied: “[P]re-filing notification of Plaintiffs’ supporting expert
 15 witnesses seems unnecessary given that Defendants will have adequate time to depose
 16 Plaintiffs’ experts after the filing of Plaintiffs’ motion.” Feldman Decl. Ex. A, p.14.

17 On July 17, 2015, Defendants filed a motion for summary judgment. Dkt. No.
 18 84. Then, between July 27 and 28, 2015, Plaintiffs filed their motion for class
 19 certification. In support they disclosed, for the first time, their three proposed experts
 20 who provided declarations: Gerald Borlin [Dkt. No. 101], Jeffrey Hansen [Dkt. No.
 21 100-2] and Lisa Mullins [Dkt. No. 100-3]. They also included a declaration from a fact
 22 witness, Christina Wickman [Dkt. No. 100-1], who is one of Plaintiffs’ attorneys of
 23 record. Plaintiffs first disclosed Ms. Wickman as a fact witness in response to a court
 24 order on July 21, long past the discovery cutoff and only days before the class
 25 certification motion was filed.

26 On July 29, 2015 defense counsel asked Plaintiffs’ counsel to provide dates to
 27 depose the four witnesses. Feldman Decl. Ex. B, p.19. Plaintiffs’ counsel did not

1 respond to that email. Feldman Decl. ¶ 12. The next day, defense counsel sent two
 2 emails asking Plaintiffs' counsel to confirm whether they would produce each witness
 3 pursuant to a deposition notice served via email. Feldman Decl. ¶¶ 12, 13. Plaintiffs'
 4 counsel did not respond. Feldman Decl. ¶¶ 12, 13. On July 31, 2015, defense counsel
 5 called each of the four attorneys of record. Feldman Decl. ¶ 14. No attorney answered
 6 the phone. Feldman Decl. ¶ 14. Defense counsel left a voicemail for each attorney of
 7 record asking that she or he discuss the depositions and confirm the attendance of the
 8 four witnesses. Feldman Decl. ¶ 14. None of Plaintiffs' attorneys of record called in
 9 return. Feldman Decl. ¶ 14.

10 On July 31, 2015 Plaintiffs' lead counsel, Patrick Keegan, sent a reply email to
 11 defense counsel saying that he could not meet and confer on the expert deposition issue
 12 until August 4, 2015. Feldman Decl. ¶ 16. Defense counsel responded, asking for
 13 confirmation of the depositions by noon on August 3, 2015. Feldman Decl. ¶ 17.
 14 Plaintiffs' counsel did not respond. Feldman Decl. ¶ 17.

15 On August 4, 2015 Defendants personally served subpoenas on Mr. Borlin and
 16 Ms. Hansen. Feldman Decl. ¶ 18. They attempted personal service several times on the
 17 other two witnesses, Ms. Wickman and Ms. Mullins. Feldman Decl. ¶¶ 18-20. But
 18 they were never personally served. *Id.*

19 Also on August 4, Patrick Keegan confirmed to defense counsel that they would
 20 not produce any of the four witnesses because "the discovery cutoff passed." Feldman
 21 Decl. ¶ 21. That same day, Defendants filed an ex parte motion asking the court to
 22 compel the deposition of the four witnesses, or strike the declarations they filed in
 23 support of Plaintiffs' motion for class certification. Dkt. No. 119.

24 On August 10, 2015 the district judge modified the class certification briefing
 25 schedule so that Defendants' opposition would not be due until 30 days after the court
 26 issued an order on the summary judgment motion, which removed the urgency of ruling
 27 on Defendants' deposition issue. Then, on September 22, the district judge denied

1 Defendants' motion to compel the depositions "**WITHOUT PREJUDICE** to raising
 2 the issue again after the Court issues an order on the motions for summary judgment."
 3 Dkt. No. 145, p.2 (emphasis in original).

4 The district judge held oral argument on the summary judgment motion on May
 5 9, 2016, and ordered that the opposition to the class certification motion be filed by July
 6 8, 2016. The court did not set a due date for the reply or set a hearing for the motion.

7 On May 10, 2016, defense counsel asked Plaintiffs to confirm whether they
 8 would produce the proposed witnesses for depositions. Plaintiffs refused to produce the
 9 three experts. They also refused to produce Ms. Wickman as a fact witness but now
 10 "agree to voluntarily withdraw the declaration of Ms. Wickman[.]" Opp'n, p.12.

11 Meanwhile, Plaintiffs filed their own ex parte motion to allow them to conduct
 12 discovery on "newly produced evidence" so that they can (1) obtain an unredacted copy
 13 of Time Warner's "Domain Name Agreement;" and (2) take a Rule 30(b)(6) deposition
 14 of Time Warner regarding the Domain Name Agreement.

15 **Discussion.**

16 **1. Legal Standard.**

17 A party may obtain discovery regarding any nonprivileged information that is
 18 relevant to any claim or defense and is proportional to the needs of the case. Fed. R.
 19 Civ. P. 26(b)(1). Proportionality considers "the importance of the issues at stake in the
 20 action, the amount in controversy, the parties' relative access to relevant information,
 21 the parties' resources, the importance of the discovery in resolving the issues, and
 22 whether the burden or expense of the proposed discovery outweighs its likely benefit."
 23 *Id.* Once the party seeking discovery establishes that the request meets this broadly-
 24 construed relevancy requirement, "the party opposing discovery has the burden of
 25 showing that the discovery should be prohibited, and the burden of clarifying,
 26 explaining or supporting its objections." *Bryant v. Ochoa*, 2009 WL 1390794 at *1
 27 (S.D. Cal. May 14, 2009) (citations omitted).

1 **2. Defendants' Request for Depositions.**

2 In the scheduling order governing discovery, the court ordered that “[f]act and
3 class discovery are not bifurcated but class discovery shall be completed by all parties
4 on or before February 27, 2015.” Dkt. No. 28 (the deadline was eventually continued to
5 June 26, 2015). Defendants argue that the four depositions cannot be compelled
6 because (1) the magistrate judge does not have jurisdiction to rule on this motion
7 because it contemplates striking evidence before the district judge; (2) the district judge
8 already ruled on this issue; (3) class discovery is closed and Defendants never requested
9 that the deadline be extended to allow for the depositions; and (4) Plaintiffs were under
10 no obligation to disclose their expert witnesses.

11 First, this is a discovery issue, and the magistrate judge has jurisdiction to rule on
12 discovery issues. If the magistrate judge contemplates ruling on a dispositive issue, the
13 ruling can be issued via a Report and Recommendation.

14 Second, the district judge denied Defendants’ first motion to compel the
15 depositions “**WITHOUT PREJUDICE** to raising the issue again after the Court issues
16 an order on the motions for summary judgment.” Dkt. No. 145, p.2 (emphasis in
17 original). This denial *without prejudice* does not moot the issue.

18 Third, Defendants had no way to conduct the discovery on the four witnesses
19 because Plaintiffs did not timely disclose them. On June 16, 2015, before the discovery
20 deadline passed Defendants even asked Plaintiffs if they would be relying on any
21 experts. Plaintiffs never answered that question. They simply assured Defendants that
22 “pre-filing notification of Plaintiffs’ supporting expert witnesses seems unnecessary
23 given that Defendants will have adequate time to depose Plaintiffs’ experts after the
24 filing of Plaintiffs’ motion.” Feldman Decl. Ex. A, p.14. So, as of June 16, 2015,
25 Defendants had no notice that Plaintiffs had intended to rely on experts in their class
26 certification motion. Even if they did, Plaintiffs indicated they would be willing to
27 stipulate to reopen discovery on the matter.

1 As soon as it became clear that Plaintiffs relied on experts in their motion and
2 refused to stipulate to their depositions, Defendants immediately requested relief from
3 the court. Therefore, Plaintiffs' arguments that Defendants dropped the ball on
4 conducting the expert discovery does not ring true. As soon as Defendants found out,
5 they tried to work out the issue with Plaintiffs. After Plaintiffs repeatedly failed to
6 respond, Defendants sought relief with the court.

7 Finally, while the scheduling order does not parse out expert discovery, it is
8 implicit that *class* discovery includes *any* discovery that will be used in support of the
9 class certification motion. In other words, “*class discovery*” includes fact and expert
10 discovery. As such, fundamental fairness requires that if Plaintiffs intended to rely on
11 experts for their class certification motion, they should have disclosed those experts.
12 Under the Federal Rules, it is inconceivable that a party can rely expert witnesses in a
13 dispositive motion without affording any opportunity to the other side to conduct
14 discovery on that expert. No amount of rule interpretation or manipulation can
15 contradict what Plaintiffs have been already told in previous orders: “If Plaintiffs do
16 not identify witnesses yet later try to use information from them as ‘evidence on a
17 motion, at a hearing, or at trial,’ Plaintiffs may be subject to sanctions in the form of
18 evidence preclusion and attorney’s fees, unless that failure is substantially justified or
19 harmless.” Dkt. No. 82, p.5 (citing Fed. R. Civ. Proc. 37(c)(1)).

20 Accordingly, the court **GRANTS** Defendants’ motion to compel the depositions
21 of the three expert witnesses. Given Plaintiffs’ offer to withdraw the declaration of Ms.
22 Wickman, the court **DENIES** Defendants’ request to depose her. Because Plaintiffs
23 have identified Ms. Wickman as a fact witness, this denial is **without prejudice** to
24 Defendants deposing her regarding merits discovery following the ruling on the class
25 certification motion.

26 Further, the court **DENIES without prejudice** Defendants’ request for sanctions
27 in the form of attorney’s fees or evidence preclusion.

1 **3. Plaintiffs' Motion for Discovery.**

2 Plaintiffs seek to obtain an unredacted copy of the "Domain Name Agreement"
3 showing that the website www.timewarnercablespecial.com was copyrighted to
4 Bridgevine, Inc., a competitor of Saveology. They also want to conduct a Rule 30(b)(6)
5 deposition of Time Warner regarding this document.

6 Defendants produced the document in response to a Rule 11 sanctions motion by
7 Plaintiffs "in an attempt to demonstrate to Plaintiffs that they had based their Rule 11
8 Motion on incorrect 'facts' and that they should withdraw their Rule 11 Motion."
9 Opp'n, pp.4-5. Defendants assert that this document has nothing to do with class
10 certification and will not rely on it in their opposition to the class certification motion.
11 Plaintiffs make no attempt to explain how it is possibly relevant to class certification.

12 Plaintiffs' request here is improper for two reasons: (1) they filed it ex parte with
13 no meet and confer and no prior notice to Defendants; and (2) it seeks discovery that is
14 not relevant to class certification. Accordingly, the court **DENIES** Plaintiffs' motion
15 for discovery. This denial is **without prejudice** to Plaintiffs seeking this discovery
16 during the merits phase of discovery following the ruling on the class certification
17 motion.

18 **Order.**

19 For good cause shown, the court **ORDERS**:

20 1. Defendants' motion for discovery is **GRANTED in part** and **DENIED in**
21 **part.** Defendants must depose Plaintiffs' three identified expert witnesses—
22 Gerald Borlin, Jeffrey Hansen and Lisa Mullins—by **June 28, 2016**.

23 Plaintiffs must make every effort to follow the deposition schedule posed by
24 Defendants.

25 2. Defendants may not depose Christina Wickman at this time but may depose
26 her during the merits discovery phase of this action.

- 1 3. Pursuant to Plaintiffs' offer, the Clerk is **DIRECTED** to **REMOVE** the
2 declaration of Christina Wickman [Dkt. No. 100-1] from the docket. This
3 removal is without prejudice to Plaintiffs filing a declaration from Ms.
4 Wickman in the future.
- 5 4. This court has conferred with Judge Bashant's chambers, and confirms that
6 Defendants' opposition deadline for the class certification motion is continued
7 for two weeks until **July 22, 2016**. The deadline for Plaintiffs to file the reply
8 is **August 5, 2016**.
- 9 5. The court **DENIES** without prejudice Defendants' request for sanctions.
- 10 6. Plaintiffs' motion for discovery is **DENIED** without prejudice to seeking the
11 discovery during the merits discovery phase of this action.

12 **IT IS SO ORDERED.**

13 Dated: June 3, 2016



14
15 Hon. Nita L. Stormes
16 United States Magistrate Judge